

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL JOHN PITTAO,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2010

No. 290690

Oakland Circuit Court

LC No. 2007-213536-FC

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant Daniel Pittao appeals his jury conviction for the first-degree premeditated murder<sup>1</sup> of his wife, Tamara Pittao. The trial court sentenced Pittao to life imprisonment without parole. We affirm.

**I. BASIC FACTS**

Daniel Pittao and Tamara Pittao were separated at the time of her murder, and she had recently filed a complaint for divorce. The police discovered Tamara Pittao's body in her apartment on Thanksgiving morning in 1997, during a welfare check after she had not been heard from for three days. Tamara Pittao's neck had been slit from ear to ear, but an examination also showed that she had been asphyxiated. There were no signs of forced entry into her apartment, the apartment door was locked, and there was no evidence of a burglary, struggle, or sexual assault. Based on Tamara Pittao's last known contact with another person, the last use of her computer and telephone, the condition of her body, and the contents of her stomach, the prosecution believed that Tamara Pittao was killed sometime during the afternoon of Monday, November 24, 1997.

At the time Tamara Pittao was killed, two criminal matters were pending against Daniel Pittao. In one case, Daniel Pittao was charged with domestic violence arising from an incident between the couple in July 1997. Tamara Pittao filed her complaint for divorce shortly after that incident. In the other case, Daniel Pittao was charged with physically assaulting his son from a prior marriage; Tamara Pittao was a witness to that May 1997 incident. The prosecution

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<sup>1</sup> MCL 750.316(1)(a).

presented testimony regarding the domestic violence incident and Daniel Pittao's assault of his son, along with other evidence of marital discord, at trial. The prosecution also presented evidence of Daniel Pittao's violent acts toward his first wife.

Daniel Pittao denied visiting Tamara Pittao's apartment during the week before her body was discovered. But a witness, David Jerome, testified that he saw a man at a dumpster outside Tamara Pittao's apartment building on November 24, 1997, between 3:00 and 4:00 p.m. According to Jerome, the man appeared out of nowhere as Jerome was bringing some trash to the dumpster, and the man looked surprised to see Jerome. The man ducked behind a black or blue "boxy-shaped" Chrysler vehicle that had been backed up to the gate of the dumpster. (At that time, Daniel Pittao drove a blue Jeep Cherokee.) In July 1998, Jerome viewed a photographic array and identified a photograph of Daniel Pittao as the man he saw at the dumpster. At trial, Jerome testified that he had no doubt that Daniel Pittao was the man he saw at the dumpster.

The police considered Daniel Pittao a suspect in Tamara Pittao's death in 1997, but he was not charged until a grand jury indicted him in 2007. The defense theory at trial was that the police inappropriately focused on Daniel Pittao as the only suspect despite the lack of evidence of his guilt; that the police engaged in questionable tactics in an attempt to manufacture a case against Daniel Pittao; that the police ignored evidence and failed to pursue leads that did not fit their theory; and that the tainted police investigation contributed to an atmosphere that caused witnesses to be biased against Daniel Pittao.

As stated, the jury convicted Daniel Pittao for the first-degree premeditated murder of Tamara Pittao, and the trial court sentenced him to life imprisonment without parole. Daniel Pittao now appeals.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. STANDARD OF REVIEW

Daniel Pittao argues that defense counsel's unreasonable strategy decisions and other various deficiencies in his performance at trial deprived Daniel Pittao of the effective assistance of counsel and denied him a fair trial. Although Daniel Pittao raised these issues in a motion for a new trial and requested an evidentiary hearing, the trial court determined that an evidentiary hearing was unnecessary and denied the motion. Because the trial court did not hold an evidentiary hearing, we limit our review of this issue to mistakes apparent from the record.<sup>2</sup>

### B. LEGAL STANDARDS

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law.<sup>3</sup> To establish ineffective assistance of counsel, a defendant must show that his defense counsel's performance fell below an objective standard of

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<sup>2</sup> *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

<sup>3</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial.<sup>4</sup> A defendant must overcome the presumption that the challenged action might be considered sound trial strategy.<sup>5</sup> To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.<sup>6</sup>

### C. FAILURE TO CHALLENGE DAVID JEROME'S IDENTIFICATION TESTIMONY

Daniel Pittao argues that defense counsel was ineffective for not attempting to suppress Jerome's identification testimony. Daniel Pittao contends that Jerome's identification was the product of "impermissible suggestiveness" and that there was no independent basis for his identification of Daniel Pittao as the man he saw outside Tamara Pittao's apartment on November 24, 1997.

An identification procedure can violate a defendant's right to due process when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.<sup>7</sup> To show a due process violation, the "defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification."<sup>8</sup> If a procedure is found to be impermissibly suggestive, a witness's in-court identification is inadmissible unless the prosecution can demonstrate, by clear and convincing evidence, that the witness had an independent basis for the identification.<sup>9</sup>

In this case, Daniel Pittao has failed to identify any impermissibly suggestive identification procedure. The record discloses that Jerome identified Daniel Pittao in a photographic array that was conducted in July 1998. Daniel Pittao does not assert that the array itself was impermissibly suggestive, nor is there any basis in the record for concluding that it was suggestive. On the contrary, Jerome testified that the police showed him an array of six photographs and asked if he recognized anyone. Jerome's testimony does not provide any basis for finding that the procedure gave rise to a substantial likelihood of misidentification.

Daniel Pittao's arguments are principally directed at the reliability of Jerome's identification, not the suggestiveness of the procedure that led to the identification. Daniel Pittao characterizes Jerome's identification in the photo array as uncertain and questionable because he also referred to another photograph. At trial, Jerome explained that he referred to another photograph only because it demonstrated how the person he saw had an open or dropped jaw as a

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<sup>4</sup> *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

<sup>5</sup> *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

<sup>6</sup> *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

<sup>7</sup> *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998);

<sup>8</sup> *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

<sup>9</sup> *Gray*, 457 Mich at 114-115.

result of Jerome surprising him. In any event, a witness's lack of certainty is relevant only to the weight of the witness's identification testimony, not its admissibility.<sup>10</sup>

Daniel Pittao also contends that there were discrepancies between Jerome's initial description of the man he saw at the dumpster and Daniel Pittao's actual appearance. Again, however, any discrepancies would be relevant only to the weight of Jerome's identification testimony, not its admissibility.<sup>11</sup> Similarly, whether subsequent developments influenced Jerome's confidence in his identification, as Daniel Pittao contends, is also relevant only to the weight of his testimony.

Because Daniel Pittao has failed to identify an improper identification procedure, there is no need to establish an independent basis for Jerome's identification. Absent an impermissibly suggestive identification procedure, any motion to suppress Jerome's identification testimony would have been futile. Counsel is not ineffective for failing to file a futile motion.<sup>12</sup>

#### D. DEFENSE COUNSEL'S CONDUCT

Daniel Pittao raises several claims challenging defense counsel's comments at trial and elicitation of testimony and evidence that he contends was prejudicial.

"Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy, as is a decision concerning what evidence to highlight during closing argument[.]"<sup>13</sup> This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it use the benefit of hindsight to assess counsel's competence.<sup>14</sup> "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases."<sup>15</sup> Therefore, the strong presumption of effective assistance applies with regard to trial strategy.<sup>16</sup> "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work."<sup>17</sup> Counsel will only be found ineffective based on strategic decisions if the strategy employed was not sound or reasonable.<sup>18</sup>

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<sup>10</sup> See *id.* at 122, 124.

<sup>11</sup> *People v Davis*, 241 Mich App 697, 705; 617 NW2d 381 (2000).

<sup>12</sup> *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

<sup>13</sup> *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (internal citations omitted).

<sup>14</sup> *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Matuszak*, 263 Mich App at 61.

<sup>18</sup> *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

## 1. DISCLOSURE REGARDING TERMINATION OF PARENTAL RIGHTS

Daniel Pittao argues that there was no reasonable strategy for defense counsel to inform the jury that Daniel Pittao had lost his parental rights to his daughter after Tamara Pittao's death and that counsel inaccurately stated that those rights were terminated without a trial.

We disagree with Daniel Pittao's claim that there was no reasonable strategy for disclosing that Daniel Pittao's parental rights to his daughter were terminated. Several of Tamara Pittao's friends and family members testified against Daniel Pittao at trial. Part of the defense strategy was to portray Daniel Pittao as a victim of the concerted effort of Tamara Pittao's friends and family to punish him for Tamara Pittao's death, notwithstanding that he had not been criminally charged. Counsel suggested that the termination of Daniel Pittao's parental rights to his daughter was an example of how others had unfairly plotted against him, even though he had not been criminally charged with Tamara Pittao's death. It was not an unreasonable strategy for defense counsel to argue to the jury that many of the witnesses had questionable motives. Further, evidence that Tamara Pittao's parents, both of whom testified against Daniel Pittao at trial, had adopted Daniel Pittao's daughter after Daniel Pittao's parental rights were terminated was relevant to show their potential bias.

Although we agree that defense counsel erred by inaccurately stating that Daniel Pittao's parental rights were terminated without a trial, there is no basis for concluding that this misstatement affected the outcome of the trial.

## 2. DISCLOSURE REGARDING INVOCATION OF RIGHT TO REMAIN SILENT AND RIGHT TO COUNSEL DURING INTERROGATION

We also disagree with Daniel Pittao's claim that it was improper for defense counsel to elicit that he invoked his constitutional rights to remain silent and his right to counsel when dealing with the police. Defense counsel used this evidence to explain why Daniel Pittao had stopped cooperating with the police and to illustrate the lengths that the police were willing to go to build a case against him. Defense counsel argued that Daniel Pittao, who was initially cooperative, was required to assert his constitutional rights to counsel and to remain silent because of the police's continued efforts to unfairly target him as the only suspect in Tamara Pittao's death, despite the lack of evidence showing that he committed the crime. Defense counsel also elicited evidence that after Daniel Pittao had asserted his rights, the police enlisted agents to secretly record or gain information from him. This was consistent with the overall defense strategy of attacking the integrity of the police investigation and questioning the police motives. Daniel Pittao has not overcome the presumption that defense counsel's strategy was reasonable.

## 3. DISCLOSURE REGARDING SUSPECT STATUS

We find no merit to Daniel Pittao's claim that defense counsel improperly advised the jury that Daniel Pittao was a suspect from the beginning of the case. As indicated previously, this was the central theme of the defense theory. Defense counsel did not suggest that Daniel Pittao was properly considered a suspect, but rather argued that the police unfairly focused on him as the only suspect, which thereby tainted their investigation.

#### 4. TESTIMONY REGARDING DOMESTIC VIOLENCE

Daniel Pittao argues that defense counsel was ineffective for eliciting from a witness, on cross-examination, that the witness gave Tamara Pittao a card for a domestic abuse shelter during an altercation with Daniel Pittao. The witness testified on direct examination that she was present when Tamara Pittao was moving out of the marital home and was uncomfortable about leaving Tamara Pittao there alone with Daniel Pittao. The purpose of defense counsel's cross-examination was to show that the witness's own experience with domestic violence clouded her perspective of the situation. During defense counsel's cross-examination, the witness gave an unresponsive answer in which she mentioned that she gave Tamara Pittao a card for a domestic abuse shelter and told Tamara Pittao to call if she ever needed her. Defense counsel immediately neutralized the effect of the response by clarifying that Tamara Pittao never called her. Under the circumstances, defense counsel's questioning of the witness and handling of the witness's unresponsive answer was not objectively unreasonable.

#### 5. TESTIMONY REGARDING INCARCERATION

Daniel Pittao argues that defense counsel was ineffective for eliciting from a police officer that Daniel Pittao was incarcerated while awaiting trial for this offense. Although the purpose of defense counsel's question is not apparent, there is no reasonable probability that it affected the outcome of Daniel Pittao's trial.

#### E. COUNSEL'S FAILURE TO CALL JOYCE WILLETT AS A WITNESS

Daniel Pittao argues that defense counsel was ineffective for failing to call Joyce Willett as a defense witness. "[T]he failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.'"<sup>19</sup> "A substantial defense is one that might have made a difference in the outcome of the trial."<sup>20</sup>

Willett submitted an affidavit in which she averred that she was "quite certain" that she would have spoken to Daniel Pittao on the telephone on Monday, November 24, 1997, in preparation for a meeting that she and Daniel Pittao attended the next day. However, she could not recall when any particular conversations took place. Willett also averred that Daniel Pittao appeared to be his "normal" self when she saw him at the meeting on Tuesday.

Daniel Pittao has not shown that Willett could have provided a substantial defense. Her testimony only would have established that she spoke to Daniel Pittao on the telephone at some unspecified time on Monday, November 24, 1997. At trial, Daniel Pittao's coworker testified that Daniel Pittao was at his office during the morning on Monday, November 24, 1997, but was not there that afternoon. Daniel Pittao's office computer showed that the last activity that day occurred at 12:42 p.m. The prosecution's theory was that Tamara Pittao was killed later in the

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<sup>19</sup> *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), quoting *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

<sup>20</sup> *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

afternoon of November 24, 1997. Evidence was presented that the computer in Tamara Pittao's apartment was last used at 2:17 p.m. that day, and telephone records indicated that the last call placed from her apartment that day was made at 1:53 p.m. Willett's proposed testimony would not have prevented the jury from consistently finding that Willett spoke to Daniel Pittao when he was at his office during the morning of November 24, 1997, and that Daniel Pittao killed Tamara Pittao later that afternoon, when, according to other evidence, Daniel Pittao was away from the office and Tamara Pittao likely was killed.

Further, Willett's observations about Daniel Pittao's "normal" demeanor on Tuesday, November 25, 1997, the day after Tamara Pittao was believed to have been killed, would not have provided a substantial defense. Other testimony was presented that Daniel Pittao seemed emotionless when telling others about Tamara Pittao's death and at her funeral. Given this testimony, the fact that Daniel Pittao did not act noticeably different one day after Tamara Pittao was killed would not have made a difference in the outcome of the trial.

Because Willett's affidavit establishes that her proposed testimony would not have provided a substantial defense, we conclude that defense counsel was not ineffective for failing to call her as a witness at trial.

#### F. REMAND FOR EVIDENTIARY HEARING

Daniel Pittao requests that this Court remand this case for an evidentiary hearing on the foregoing ineffective assistance of counsel claims. But where, as here, a defendant's challenges are insufficient to raise a constitutional infirmity, the defendant fails to substantiate his allegations with factual support, and record is sufficient to review the defendant's claims, an evidentiary hearing is not necessary.<sup>21</sup>

### III. THE TRIAL COURT'S EVIDENTIARY RULINGS

#### A. STANDARD OF REVIEW

Daniel Pittao challenges several of the trial court's evidentiary rulings. We review for an abuse of discretion a trial court's decision to admit or exclude evidence.<sup>22</sup> However, we review de novo any preliminary questions of law.<sup>23</sup> And, to the extent that Daniel Pittao raises constitutional issues, we also review those issues de novo.<sup>24</sup>

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<sup>21</sup> *People v Johnson*, 202 Mich App 281, 285; 508 NW2d 509 (1993); see also *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

<sup>22</sup> *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

<sup>23</sup> *Id.*

<sup>24</sup> *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

## B. THE PERSONAL PROTECTION ORDER

Daniel Pittao argues that the trial court erred in admitting evidence of a personal protection order (“PPO”) that Tamara Pittao obtained against Daniel Pittao in July 1997. Daniel Pittao contends that the PPO itself was inadmissible hearsay and that the trial court should have excluded the PPO evidence because its prejudicial effect outweighed any probative value.

The PPO was admissible pursuant to MCL 600.2106, which provides that a court order issued under seal “shall be admissible in evidence in any court in this state, and shall be prima facie evidence . . . of all facts recited therein[.]”<sup>25</sup> Further, Daniel Pittao has not shown that the trial court should have excluded the PPO evidence under MRE 403, which provides that relevant evidence may be excluded if the danger of unfair prejudice substantially outweighed its probative value.<sup>26</sup> Unfair prejudice does not mean any prejudice, but refers to “the tendency of the proposed evidence to adversely affect the objecting party’s position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.”<sup>27</sup> The PPO evidence was relevant to show marital discord and the nature of the relationship between Daniel Pittao and Tamara Pittao. The potential for unfair prejudice was low because Daniel Pittao had acknowledged the existence of the PPO during a police interview, as well as the domestic violence incident that led Tamara Pittao to obtain it. Further, the trial court gave a cautionary instruction advising the jury on the limited purpose of the evidence, thereby minimizing any prejudicial effect. Accordingly, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

Daniel Pittao also argues that the PPO violated his right of confrontation. “The Confrontation Clause of the Sixth Amendment bars the admission of ‘testimonial’ statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness.”<sup>28</sup> Even assuming the PPO could be deemed to contain testimonial statements, it provides that Daniel Pittao had the right to request a hearing within 14 days of the issuance of the order. Thus, Daniel Pittao had a prior opportunity to cross-examine Tamara Pittao regarding any statements in the PPO. Accordingly, Daniel Pittao has not established that admission of the PPO violated his rights under the Confrontation Clause.

## C. WENDY SMITTER’S TESTIMONY

Daniel Pittao argues that the trial court erred in allowing Wendy Smitter to testify about statements that Tamara Pittao made to her regarding a confrontation between Tamara Pittao and

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<sup>25</sup> See also *People v Williams*, 134 Mich App 639, 641-642; 351 NW2d 878 (1984).

<sup>26</sup> *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000).

<sup>27</sup> *Pickens*, 446 Mich at 336-337, quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

<sup>28</sup> *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).



Daniel Pittao along a freeway. According to Smitter, Tamara Pittao telephoned Smitter as Tamara Pittao was driving on the freeway and told Smitter that Daniel Pittao was driving behind her, flashing his lights, and attempting to force her off the freeway. Tamara Pittao further reported that the police had been contacted, that she had stopped her vehicle, and that Daniel Pittao had left his vehicle and was pounding on the car windows, screaming obscenities, including, “I will kill you before I let you leave me.” Daniel Pittao argues that Tamara Pittao’s statements to Smitter were inadmissible hearsay.

The trial court found, and we agree, that Tamara Pittao’s statements to Smitter were admissible under the present sense impression exception<sup>29</sup> and the excited utterance exception<sup>30</sup> to the hearsay rule. The statements were admissible under the present sense impression exception because they involved Tamara Pittao’s descriptions of Daniel Pittao’s conduct while she was perceiving the conduct or immediately thereafter.<sup>31</sup> The statements were also admissible under the excited utterance exception because they related to a startling event (Daniel Pittao’s attempts to force Tamara Pittao off the freeway and his subsequent threatening conduct), and they were made during the events, while Tamara Pittao was upset and frightened, and thus was under the stress of excitement that Daniel Pittao’s conduct caused.<sup>32</sup> Daniel Pittao’s reliance on *People v Fisher*<sup>33</sup> and *People v Moor*<sup>34</sup> to argue that Tamara Pittao’s statements were not admissible is misplaced because neither of those cases involves the admissibility of statements under MRE 803(1) or (2).<sup>35</sup>

Daniel Pittao also argues that the trial court should not have permitted Smitter’s testimony regarding Tamara Pittao’s statements because Smitter’s account of the events was suspect. Because Daniel Pittao did not object to the admissibility of Smitter’s testimony on this basis at trial, this issue is not preserved. Accordingly, Daniel Pittao must show a plain error affecting his substantial rights.<sup>36</sup> Here, Daniel Pittao is unable to establish a plain error because

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<sup>29</sup> MRE 803(1).

<sup>30</sup> MRE 803(2).

<sup>31</sup> *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998).

<sup>32</sup> *People v Barrett*, 480 Mich 125, 134-137; 747 NW2d 797 (2008); *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

<sup>33</sup> *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995).

<sup>34</sup> *People v Moor*, 262 Mich App 64; 683 NW2d 736 (2004).

<sup>35</sup> The trial court also found that Tamara Pittao’s statements were admissible under MRE 804(b)(6), which applies to statements offered against a party who has engaged in wrongdoing that was intended to, and did, procure the declarant’s unavailability as a witness. Although we agree that the trial court’s reliance on this additional rule is questionable, because we conclude that the statements were admissible under MRE 803(1) and (2), any error in relying on MRE 804(b)(6) as an additional basis for admitting the statements was harmless.

<sup>36</sup> *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

the credibility of Smitter's testimony did not affect its admissibility. Rather, Smitter's credibility was properly left for the jury to resolve.<sup>37</sup>

Further, there is no merit to Daniel Pittao's argument that the admission of Tamara Pittao's statements violated his constitutional right of confrontation. The Confrontation Clause only bars the admission of testimonial statements.<sup>38</sup> Here, Tamara Pittao made the statements to her friend contemporaneously with the events. She did not make the statements to law enforcement personnel or for investigatory purposes. Accordingly, they do not qualify as "testimonial" statements, and the Confrontation Clause does not bar their admission.<sup>39</sup>

#### D. EVIDENCE OF PRIOR ABUSE

Daniel Pittao argues that the trial court erroneously allowed his first wife to testify about his acts of domestic violence during their relationship and erroneously allowed his son to testify regarding his acts of physical abuse directed at the son.

The testimony was admissible pursuant to MCL 768.27b(1), which permits evidence of a defendant's other acts of domestic violence in a case in which the defendant is charged with an offense that involves domestic violence. Because the statute only affects the admissibility of a type of evidence and does not change the burden of proof necessary to establish a crime, ease the presumption of innocence, or downgrade the type of evidence necessary to support a conviction, its application to permit evidence of conduct that occurred before March 24, 2006, the effective date of the statute,<sup>40</sup> does not violate the Ex Post Facto Clause.<sup>41</sup> Similarly, the statute does not violate the separation of powers doctrine.<sup>42</sup>

We also reject Daniel Pittao's argument that his right to due process was violated because MCL 768.27b permitted the jury to consider the prior acts evidence for any purpose. The trial court gave a cautionary instruction advising the jury on the limited purpose of the evidence. The trial court's instruction protected Daniel Pittao's due process rights. Although Daniel Pittao also argues that there were inconsistencies or problems with his first wife's account of events, those matters only affect the credibility of her testimony, not its admissibility. The issue of credibility was for the jury to resolve.<sup>43</sup>

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<sup>37</sup> *Odom*, 276 Mich App at 419.

<sup>38</sup> *Crawford*, 541 US at 59, 68.

<sup>39</sup> *Walker*, 273 Mich App at 61-65.

<sup>40</sup> See 2006 PA 78.

<sup>41</sup> US Const, art 1, § 10, cl 1; Const 1963, art 1, § 10; *People v Schultz*, 278 Mich App 776, 777-779; 754 NW2d 925 (2008); *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007).

<sup>42</sup> *Schultz*, 278 Mich App at 779; *Pattison*, 276 Mich App at 619-620.

<sup>43</sup> *Odom*, 276 Mich App 419.

Daniel Pittao also argues that Fraser's testimony was inadmissible because it involved acts committed more than ten years before the charged crime occurred in 1997. MCL 768.27b(4) provides that evidence of an act occurring more than ten years before the charged offense is inadmissible unless the trial court determines that admitting the evidence is in the interest of justice. The age of the evidence did not make it any less probative, nor did it substantially increase the danger of unfair prejudice. Considering the similarities between Daniel Pittao's acts toward his first wife and his abusive treatment of Tamara Pittao and his son, and the types of matters that provoked Daniel Pittao's reactions, the trial court did not abuse its discretion in determining that it was in the interest of justice for the jury to consider it.

We affirm.

/s/ Donald S. Owens  
/s/ William C. Whitbeck  
/s/ Karen Fort Hood